

**A Azizah bte Shaik Ismail & Anor v
Fatimah bte Shaik Ismail & Anor**

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–49
OF 2002(P)

B HAIDAR CJ (MALAYA), ABDUL MALEK AHMAD AND ABDUL HAMID
MOHAMAD FCJ
16 SEPTEMBER 2003

*Constitutional Law — Courts — Jurisdiction — Jurisdiction of High Court and Syariah
Court — Determining jurisdiction of Syariah Court — Whether to adopt subject matter
approach or remedy approach — Federal Constitution art 121(1A)*

C *Criminal Procedure — Habeas corpus — Proper procedure — Custody of Muslim child —
Whether High Court had jurisdiction to hear habeas corpus application — Whether custody
matter within exclusive jurisdiction of Syariah Court — Whether right to enforce syariah
custody order through habeas corpus application before High Court*

D *Islamic Law — Jurisdiction — Syariah Court — Application in respect of custody of
Muslim child — Parties to application Muslims — Whether High Court had jurisdiction
to hear application — Whether application should be made to Syariah Court — Federal
Constitution art 121(1A)*

E The appellants were natural parents of Nazirah ('the child') who had been
taken care of by the first respondent (first appellant's sister) since birth due
to the ill-health of the first appellant. The appellants had earlier obtained an
order of custody of the child from the Syariah Subordinate Court. However,
the child went back to live with the respondents who refused to returned the
child to the appellants. The appellants then applied in the same Syariah Court
for an order that the respondents be committed to prison for breaching the
custody order. The Syariah Court judge, however, dismissed the application as
F he found that the respondents had shown reasonable cause why they should
not be committed to prison. The appellants did not appeal this decision and
the child continued to live with the respondents. Subsequently, the appellants
filed a notice of motion in the High Court for a writ of habeas corpus against
the respondents for them to hand over the child to the appellants. At the
G hearing, the respondents raised the preliminary objection that the application,
being one for the custody of a Muslim child, was within the exclusive jurisdiction
of the syariah courts, and thus the civil courts, by reason of art 121(1A) of
the Federal Constitution, had no jurisdiction to entertain the same. The judicial
commissioner upheld the preliminary objection and dismissed the application.
H Hence, the appellants appeal to the Federal Court.

Held, dismissing the appeal:

I (1) This appeal raised the question of jurisdiction of the Syariah Court
and the High Court. By virtue of art 121(1A) of the Federal Constitution,
if the Syariah Court had jurisdiction over the matter, the High Court
would not have jurisdiction over it. This calls for the determination of
the approach that the court should take in determining the jurisdiction
of the Syariah Court. Therefore, in the instant case, the Federal Court

had adopted the subject matter approach and not the remedy approach (see paras 5, 8–9); *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 and *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 followed.

- (2) Since the subject matter in question was the custody of the child and since that was clearly within the jurisdiction of the Syariah Court, by virtue of the provisions of art 121(1A) of the Federal Constitution, the High Court had no jurisdiction over the matter (see para 11).
- (3) The appellants had a right of appeal against the order of the Syariah Court but instead they went to the High Court to get their remedy which was not available to them. They had gone to the High Court to enforce an order of the Syariah Court by way of a writ of habeas corpus which clearly had no jurisdiction to entertain the application (see para 12).

[Bahasa Malaysia summary]

Perayu-perayu adalah ibubapa kandung Nazirah ('kanak-kanak tersebut') yang telah dibela oleh responden pertama (kakak perayu pertama) sejak lahir disebabkan oleh masalah kesihatan perayu pertama. Perayu-perayu telah sebelum ini memperoleh perintah jagaan ke atas kanak-kanak tersebut daripada Mahkamah Rendah Syariah. Namun begitu, kanak-kanak tersebut telah kembali tinggal dengan responden-responden yang enggan memulangkan kanak-kanak tersebut kepada perayu-perayu. Perayu-perayu kemudian memohon di Mahkamah Syariah yang sama satu perintah agar responden-responden dipenjarakan kerana melanggar perintah jagaan tersebut. Hakim Mahkamah Syariah, bagaimanapun, menolak permohonan tersebut kerana beliau mendapati bahawa responden-responden telah menunjukkan sebab munasabah kenapa mereka tidak patut dipenjarakan. Perayu-perayu tidak merayu terhadap keputusan ini dan kanak-kanak tersebut terus menetap dengan responden-responden. Berikutan itu, perayu-perayu telah memfailkan satu notis usul di Mahkamah Tinggi untuk satu writ habeas corpus terhadap responden-responden agar mereka menyerahkan kanak-kanak tersebut kepada perayu-perayu. Semasa perbicaraan, responden-responden telah menimbulkan bantahan awal yang mana permohonan tersebut, yang merupakan suatu untuk penjagaan kanak-kanak Muslim, adalah dalam bidang kuasa mutlak mahkamah-mahkamah syariah, dan oleh itu mahkamah-mahkamah sivil, dengan alasan perkara 121(1A) Perlembagaan Persekutuan, tidak mempunyai bidang kuasa untuk melayan yang sama. Pesuruhjaya kehakiman telah mengekalkan bantahan tersebut dan menolak permohonan tersebut. Justeru itu, perayu-perayu telah merayu ke Mahkamah Persekutuan.

Diputuskan, menolak rayuan tersebut:

- (1) Rayuan ini menimbulkan persoalan tentang bidang kuasa Mahkamah Syariah dan Mahkamah Tinggi. Menurut perkara 121(1A) Perlembagaan Persekutuan, jika Mahkamah Syariah mempunyai bidang kuasa ke atas perkara tersebut, Mahkamah Tinggi tidak akan mempunyai bidang kuasa

- A** ke atasnya. Ini memerlukan penentuan tentang pendekatan yang mahkamah patut ambil dalam menentukan bidang kuasa Mahkamah Syariah. Oleh itu, dalam kes semasa, Mahkamah Persekutuan telah menggunakan pendekatan perkara pokok dan bukan pendekatan remedi (lihat perenggan-perenggan 5, 8–9); *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 dan *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 diikuti.
- B**
- (2) Memandangkan perkara pokok yang dipersoalkan adalah tentang penjagaan kanak-kanak tersebut dan memandangkan ia dengan jelas dalam bidang kuasa Mahkamah Syariah, menurut perkara 121(1A) Perlembagaan Persekutuan, Mahkamah Tinggi tiada bidang kuasa keatas perkara tersebut (lihat perenggan 11).
- C**
- (3) Perayu-perayu mempunyai hak untuk merayu terhadap perintah Mahkamah Syariah tetapi sebaliknya mereka telah pergi ke Mahkamah Tinggi untuk mendapat remedi mereka yang tidak diperuntukkan untuk mereka. Mereka telah ke Mahkamah Tinggi untuk menguatkuasakan satu perintah Mahkamah Syariah melalui satu writ habeas corpus yang dengan jelas tiada bidang kuasa untuk melayan permohonan tersebut (lihat perenggan 12).]
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Notes

- E** For cases on jurisdiction of courts, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1684–1692.
For cases on jurisdiction of the Syariah Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 517–539.
For cases on proper procedure for habeas corpus, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1803–1818.
- F** For custody of child under Islamic family law, see 14 *Halsbury's Laws of Malaysia* para [250.393].
For jurisdiction of courts, see 2 *Halsbury's Laws of Malaysia* paras [20.066]–[20.073].

G Cases referred to

- Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 (folld)
Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain [1992] 2 MLJ 244 (refd)
Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (folld)
- H** *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266 (refd)

Legislation referred to

- I** Federal Constitution art 121(1A)
Darshan Singh Khaira (Darshan Singh & Co) for the appellant.
Ahmad Munawir Abd Aziz (Lim Kean Siew & Co) for the respondent.

Abdul Hamid Mohamad FCJ (delivering judgment of the court):

[1] The appellants before us are husband and wife. So are the respondents. The first appellant and the first respondent are sisters. The appellants are the natural parents of Nazirah, the child in question. Due to the first appellant's ill-health, soon after Nazirah was born, she was given to the first respondent to be taken care of. That was in December 1987. However, in September 2000, the appellants filed a summons in Syariah Subordinate Court at Georgetown for an order of custody of the child. The respondents did not object to the summons. The Syariah Court gave the appellants the custody of the child until she reaches the age of 16 years and thereafter to be returned to the respondents. The child, however, later on went back to live with the respondents. The respondents refused to return the child to the appellants. On 21 November 2000, the appellants applied in the same Syariah Court for an order that the respondents be committed to prison for breaching the custody order. However, on 4 May 2001 the learned Syariah Court judge dismissed the application as he found that the respondents had shown reasonable cause why they should not be committed to prison. The appellants did not appeal against that order and the child continued to live with the respondents.

[2] On 12 December 2001, the appellants filed a notice of motion praying for the issue of a writ of habeas corpus against the respondents for them to hand over the child to the appellants.

[3] The learned judicial commissioner dismissed the application on the preliminary issue that the High Court had no jurisdiction over the matter. The appellants appealed to this court. We dismissed the appeal and we now give our reasons.

[4] Learned counsel for the appellants argued that as the Syariah Courts had no jurisdiction to issue the writ of habeas corpus, therefore the civil court had the jurisdiction. He relied on *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266 (CA).

[5] This appeal has again raised the question of jurisdiction of the Syariah Court and the High Court. If the Syariah Court has jurisdiction over the matter, the High Court does not have jurisdiction over it — art 121(1A) of the Federal Constitution. That calls for the determination of the approach that the court should take in determining the jurisdiction of the Syariah Court.

[6] This court has very recently decided on this point in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705. In that case, the subject matter was the adjudication and administration of the will of a deceased Muslim, even though the respondents (plaintiffs in the High Court) had prayed for remedies of a declaration that the land in question be surrendered to the estate of Shaik Eusoff bin Shaik Latiff, deceased, a declaration that the land in question be vested upon the respondents as executors of the deceased's estate and for an account and, in the alternative, the respondents prayed for damages and an injunction.

[7] Haidar CJ (Malaya) (delivering the judgment of the court) surveyed the earlier judgments of this court, the Supreme Court as well as of the High Court and concluded:

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A We respectfully agree with Abdul Hamid Mohamad J that Isa Abdul Rahman cannot be supported.

[8] It should be noted that 'Isa Abdul Rahman' is the case of *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain* [1992] 2 MLJ 244 (SC). In that case, even though the land and mosque in issue were a 'wakaf am', the Supreme Court held that since the real order asked for by the respondents was a perpetual injunction to restrain the appellant or its agents from demolishing the said mosque and to restrain the appellant from taking any preliminary steps to demolish the mosque and erect a commercial building on the site and since the Syariah Courts did not have jurisdiction to issue an injunction, therefore the High Court had jurisdiction over the suit. This approach is what has become known as 'the remedy approach'. Secondly, the decision of Abdul Hamid Mohamad J (as he then was) referred to in the judgment of Haidar CJ (Malaya) refers to the case of *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 (HC) which adopted the 'subject matter' approach.

D [9] Therefore, this court has put to rest that the subject matter approach should be adopted.

E [10] In this case, there is not doubt that the subject matter of the case is the custody of the child. That clearly falls within the jurisdiction of the Syariah Court. Even learned counsel for the appellants did not dispute that. His argument was that since the Syariah Court had no jurisdiction to issue the writ of habeas corpus, the civil court had the jurisdiction to issue the same in this case. The short answer to that argument is that habeas corpus is the remedy sought and not the subject matter of the case.

F [11] Since the subject matter in question is the custody of the child and since that is clearly within the jurisdiction of the Syariah Court, by virtue of the provisions of art 121(1A) of the Federal Constitution, the High Court has no jurisdiction over the matter.

G [12] The appellants had a right of appeal against the order of the Syariah Court dated 4 May 2001, but failed to exercise that right. For reasons best known to them, they went to the High Court to get their remedy, which, in our view, is not available to them. They had, in fact, gone to the High Court to enforce an order of the Syariah Court, by way of a writ of habeas corpus. The High Court clearly has no jurisdiction to entertain the application.

H The learned judicial commissioner was right in her judgment. For these reasons, we dismissed the appeal.

Appeal dismissed.

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Reported by Ezatul Zuria Azhari